Supreme Court, U.S.
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No. 06-30

In The

Supreme Court of the United States

ALEX D.,

Petitioner,

v.

ARIZONA DEPARTMENT OF SECURITY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Arizona Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Arizona Revised Statute §8-533(8)(b), which permits the termination of parental rights when the child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement, the parent has been unable to remedy the circumstances which cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future, is unconstitutional as violating the Due Process Clause of the Fourteenth Amendment since the phrase "circumstances which cause out-of-home placement" is unconstitutionally vague.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the court below is a father whose parental rights were terminated by the court.

The Respondent here and in the court below are the Arizona Department of Economic Security who placed the minor in temporary custody of third parties, and Olivia D., the latter being the mother whose parental rights were also terminated.

Pursuant to Rule 29.6, the Petitioner states that no parties are corporations.

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OPINION BELOW

The Memorandum Decision of the Arizona Court of Appeals and the Order of the Arizona Supreme Court were not published. Copies are attached to the Appendix.

BASIS FOR JURISDICTION OF UNITED STATES SUPREME COURT

A. Stage of Proceedings When the Federal Questions Sought to be Reviewed Were Raised

The order sought to be reviewed was the Memorandum Decision of the Arizona Court of Appeals on October 27, 2005.

B. The Date of Any Order Respecting Rehearing

On November 28, 2005, the Petitioner filed a Petition for Supreme Court Review with the Arizona Supreme Court. The Arizona Supreme Court denied Petitioner's Petition for Supreme Court review on April 20, 2006.

C. The Statutory Provision Believed to Confer Jurisdiction on This Court to Review on Writ of Certiorari

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fourteenth Amendment to the United States Constitution

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

2. Arizona Revised Statutes §8-533(8)(b)

8-533. Petition; who may file; grounds

A. Any person or agency that has a legitimate interest in the welfare of a child, including, but not limited to, a relative, a foster parent, a physician, the department of economic security or a private licensed child welfare agency, may file a petition for the termination of the parent-child relationship alleging grounds contained in subsection B of this section.

B. Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court shall also consider the best interests of the child:

* * *

(b) The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to section 8-806, the parent has been unable to remedy the circumstances which cause the child to be in an out-of-home placement and there is a substantial likelihood that

the parent will not be capable of exercising proper and effective parental care and control in the near future.

STATEMENT OF THE CASE

The father (Alex D.) adopted the child (Olivia D.) when she was very young and the family moved to Arizona from New York. The Mother (Ann D.) had a history of drug abuse and fled with the child back to New York. Child Protective Services of New York was contacted by Father and returned the child to Father, giving the Father custody of the child from the State of New York.

Mother and Father lived together for a short period of time and Mother again took the child and was living with a boyfriend when the child was physically abused. Thus a dependency petition was filed by the State on March 23, 2003 regarding the child.

Father requested the child to be returned to him since Father and child were closely bonded. On May 23, 2003, Father participated in a mediation but no agreement was reached. Subsequently, at the pre-trial conference, the trial judge found Olivia D. dependent as to Father. A permanency planning hearing was conducted on April 14, 2004, but continued two times. At the last permanency planning hearing, the State was ordered to file a Motion for Termination of Parent-Child relationship. The Motion was filed regarding Mother and Father on August 23, 2003. At the pre-trial conference held on October 13, 2003, the mother did not appear and several trial dates were

scheduled for Father, who contested the termination. Mother was defaulted at the hearing.

The contested severance trial lasted several days. The court terminated Father's parental rights on November 22, 2004. A timely Notice of Appeal was filed on November 22, 2004. After the parties' briefs were filed, the Court of Appeals affirmed the trial court's ruling on October 27, 2005.

2. Stage in Proceedings When the Federal Question Was Sought to Be Reviewed Were Raised

The issue of the constitutionality of the phrase "circumstances which cause out-of-home placement" was first presented in Petitioner's Opening Brief to the Arizona Court of Appeals filed March 11, 2005. It was also presented in Appellant's Reply Brief filed June 13, 2005 as well as Petitioner's Petition for Supreme Court Review to the Arizona Supreme Court.

3. Manner in which Federal Question Was Raised

The issue was raised in the arguments set forth in Appellant's Opening and Reply Brief to the Arizona Court of Appeals and the Petition for Review to the Arizona Supreme Court.

4. Manner in which the Courts Passed on the Federal Question

The Arizona Court of Appeals passed on the Federal Question in its Memorandum Decision of October 27, 2005, by ruling that the phrase "circumstances which cause out-of-home" placement is not unconstitutionally vague.

5. Specific Portions of Record Where Matter Appears

The matter appears on pages 9 and 10 of Appellant's Opening Brief; on page 1 of Appellant's Reply Brief and on Page 6 of Appellant's Petition for Supreme Court Review to the Arizona Supreme Court. It appears on pages 11 through 16 of the Arizona Court of Appeals' Memorandum Decision of October 27, 2005.

6. Reasons Relied on for Allowance of Writ (Rule 10)

The reason that Appellant relies on for the allowance of this writ is that the Arizona State Court has decided an important federal question regarding the statutory scheme for termination of parental rights in a way that conflicts with relevant decisions of this Court regarding the fundamental rights of parents.

REASONS FOR GRANTING THE WRIT

Under Arizona law, the State may terminate parental rights upon finding that the parents' child has been in an out-of-home placement for a cumulative total period of 15 months[1] or longer pursuant to court order or voluntary placement, the parent has been unable to remedy the circumstances which cause the child to be in an out-of-home placement and there is a substantial likelihood that

[1] Previously the statute required a two (2) year out-of-home placement.

the parent will not be capable of exercising proper and effective parental care and control in the near future.

However, the statute does not define the term "circumstances which cause the child to be in an out-of-home placement." Social workers and aides decide when the child is to be taken out of the home and placed with third parties.

Parental rights stem from the liberty protected by the Due Process Clause of the Fourteenth Amendment. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232-233 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753-754 (1982).

As Justice O'Connor stated in *Troxel v. Granville*, 530 U.S. 57 (2000):

> "The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who

> nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, at 535. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166."

As the U.S. Supreme Court noted in *Santosky v. Kramer*, 455 U.S. 745, 752-757 (1982) the fundamental liberty interest of natural parents in the care custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. A parental rights termination proceeding interferes with that fundamental liberty interest so the state must provide the parents with fundamentally fair procedures.

The term "circumstances which cause the child to be in an out-of-home placement" is not defined in the Arizona parental rights termination statutes. The term is vague and is overly broad which results in the state having almost unlimited power to determine what circumstances lead to a placement out of the home. There is no specific guidance as to what behavior will result in the state removing the child from the home or what circumstances justify the removal. The statute does not require harm to the child. The state determines what circumstances permit it to remove the child. The statue does not articulate any standards of behavior which will result in an out-of-home placement.

The Arizona Court of Appeals acknowledged that a statute is unconstitutionally vague "if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, or if it allows for arbitrary and discriminatory enforcement by failing to provide an objective standard for those who are charged with enforcing the law." *Maricopa County Juv. Action No. JS-5209 and No. JS-4963*, 143 Ariz. 178, 183, 692 P.2d 1027, 1032 (Ariz. App. 1984). However, instead of analyzing the term "circumstances which cause out-of-home placement," under its own standard of unconstitutional vagueness, the Arizona Court of Appeals proceeded to analyze the term "parental responsibilities."

The Arizona Court of Appeals then makes the astonishing statement that to the extent that Father implies that he was not notified of the circumstances he would have to remedy before he could regain custody of his child, the records and testimony of the ADES caseworker and parent aides reflect Father was advised at every state of his daughter's development about what he needed to do to regain custody. This leaves the decision as to what standard applies to circumstances which cause the out-of-home placement to caseworkers and parent aides. How do they know what the term means or what standard applies?

The Appellate Court goes on to state that the Father was unable to remedy those circumstances, whatever they were, because experts "opined" that he did not understand how to effectively parent or set boundaries, and that his daughter was distressed when he visited and that the Father presented a risk for physical or emotional abuse although there was not sufficient evidence to support these conclusions.

Since the Arizona statute in question presents no guidance as to what circumstances will cause an out-of-home placement, nor what actions the parents must take to remedy those circumstances, the parents' parental rights will be terminated after 15 months. Leaving it up to social workers and parent aides to set the standard violates the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the forgoing reasons, Petitioner submits that this Court should grant review in this case to remand this matter to the Arizona Supreme Court and mandate that it reverse the holding of the Arizona Court of Appeals in terminating the parental rights of the Petitioner. Petitioner would also ask this Court to declare Arizona Revised Statute §8-533(8)(b) to be unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment of United States Constitution.

July 5, 2006

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

ALEX D.,	) 1 CA-JV 04-0232
Appellant,	) DEPARTMENT C
v.	) **MEMORANDUM**
ARIZONA DEPARTMENT OF ECONOMIC SECURITY and OLIVIA D.,	) **DECISION**) (Not for Publication –) Ariz, R.P. Juv. Ct. 88(G);) ARCAP 28)
Appellees.	)

Appeal from the Superior Court in Maricopa County

Cause No. JD 12403

The Honorable William P. Sargeant, Judge

AFFIRMED

(Filed Oct. 27, 2005)

Terry Goddard, Arizona Attorney General — Phoenix
by Dawn R. Williams, Assistant Attorney General
Attorneys for Appellee

Joseph W. Charles, PC — Phoenix
by Charles W. Charles
Attorneys for Appellant

KESLER, Presiding Judge

¶1 Alex D. ("Father") appeals from the decision of the juvenile court terminating his parental rights. For the following reasons we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The Arizona Department of Economic Security ("ADES") took Olivia D. ("Olivia") into temporary custody and placed her in a shelter after being informed that Olivia had burn marks on her body allegedly caused by her Mother, Anne D. ("Mother").[1] ADES subsequently filed a petition alleging that Olivia was dependent as to Mother and Father.[2] The petition alleged Mother physically abused Olivia by burning her with cigarettes and a lighter, and that Mother had a history of substance abuse. The petition also alleged Father physically abused Mother in front of Olivia, that he "puts [Olivia] at risk when he assaults [Mother] and that he abuses alcohol."

¶3 Psychological examinations determined Olivia has special needs, is easily frustrated, difficult to redirect, and developmentally delayed A bonding and attachment assessment of Olivia also noted she is easily frustrated and has poor attention span and anger control. Further, she exhibits delays in cognitive functioning and developmental delays "across the board" and requires "the ongoing presence of a caregiver with superior parenting skills." A forensic report showed Olivia is developmentally delayed, and that her behavior is consistent with children who have witnessed sexual intercourse and viewed pornographic images. That report recommended a permanent placement with "psychologically sophisticated and skillful" caregivers to address her special needs.

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[1] Olivia was later moved into a foster home.

[2] Father was determined by the court to be Olivia's adoptive Father.

¶4 The juvenile court adjudicated Olivia dependent as to Father and approved ADES's proposed case plan tasks and services.[3] The case plan required Father to participate in urinalysis testing, complete a psychological evaluation, comply with any recommended services, complete a substance-abuse assessment, follow any recommendations, and work with a parent aide to develop parenting skills. Father also had weekly supervised visits.

¶5 Over, one year later, ADES filed a motion to terminate Mother and Father's parental rights alleging both parents have a history of mental illness and substance abuse that is likely to continue for a prolonged period. ADES also alleged that Olivia had been in an out-of-home placement for greater than fifteen months, that ADES made a diligent effort to provide appropriate reunification services, that both parents were unable to remedy the cause of Olivia's out-of-home placement and were unlikely to be capable of parenting in the near future. *See* Arizona Revised Statutes ("A.R.S.") sections 8-533(B)(3) and (B)(8) (Supp. 2005). Finally, ADES alleged that parental, termination, was in Olivia's best interests.

¶6 Olivia was placed into a prospective adoptive home. The caseworker testified the adoptive family was aware of and able to meet Olivia's special needs. Evidence was also presented that Olivia is an adoptable child.

¶7 The juvenile court terminated Mother's parental rights in her absence and she has not appealed from that order. At father's termination hearings, the following evidence was presented.

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[3] The juvenile court later adjudicated Olivia dependent as to Mother.

¶8 ADES began facilitating reunification services upon Olivia's removal from her home. ADES arranged for Father to participate in services including urinalysis testing, a substance-abuse assessment, a parent-aide intake appointment, a psychological evaluation and related testing, domestic-violence counseling, and supervised visitation. Father also attended outpatient treatment for substance abuse, was assigned a parent aide through Family Preservationists and participated in parenting skills training and individual counseling.

¶9 Dr. James Thal, a license [sic] psychologist, conducted a detailed evaluation of Father. Dr. Thal observed that Father portrayed personality deficits and expressed concern that these deficits could interfere with his ability to parent Olivia. He was specifically concerned with whether Father could set proper boundaries with Olivia and pointed out that Father referred to Olivia as his "best friend" and had unrealistic expectations of her. Father's relationship with Mother was also disconcerting to Dr. Thal. Dr. Thal stated that Father often left Olivia alone with Mother, notwithstanding Father's express concerns about Mother's mental health and substance abuse.

¶10 Dr. Thal also observed that Father "express[es] affection for and devotion to his daughter along with willingness to do whatever is necessary in order to regain custody of her." Dr. Thal stated that it was unclear whether Father's deficiency as a parent would continue for a prolonged period of time. Therefore, Dr. Thal recommended that Father participate in a psychosexual evaluation to determine whether he posed a sexual risk to Olivia, continue with random urinalysis testing and supervised visits, and complete additional parent training.

¶11 Father's parent aide, Cher Jenkins of Family Preservationists, prepared an assessment of Father's progress. The assessment report noted Father obtained substance abuse treatment and random urinalysis testing, maintained stable housing, had instruction on life management skills, parenting education, instruction on discipline techniques, participated in supervised visits with Olivia and continued individual visits with Ms. Jenkins. The report also noted that Father loved Olivia and wished to spend time with her.

¶12 Despite these services and, Father's motivation, Ms. Jenkins found Father unable to demonstrate effective parenting skills, unable to set boundaries with Olivia or provide nutritious meals and that he focused on negative issues with Mother. Ms. Jenkins noted Olivia's behavior "chang[es] for the worse upon arrival to visitation and following visitation." Olivia "easily leav[es] the visitation and [] does not appear to be upset when leaving [Father]." Ms. Jenkins opined that the frequency of the visitations should therefore be reviewed as they are disruptive to Olivia.

¶13 Dr. Steven Gray performed a psychosexual evaluation and opined Father did not present a sexual risk to Olivia. However, Dr. Gray found that Father may have a "distorted notion of the needs and abilities of young children" and that he also presented a risk for physical or emotional abuse. Dr. Gray opined however that this risk could be reduced if Father underwent consistent counseling, therapy, and parent training.

¶14 Father attended individual and parent-child therapy every other week and continued to meet with the parent aide on alternating weeks. Father reportedly

missed several individual therapy sessions and parenting classes but was overall compliant.

¶15 Father completed about a year of parenting classes and various other programs. However, over a six-month period, several professionals assessed Father's progress and determined that he had not progressed in his parenting skills and that the services provided by ADES were futile.

¶16 Dr. Johnson, a licensed psychologist, conducted a detailed assessment. Among her concerns were that Father lacked appropriate parenting skills, failed to appropriately interact and communicate with Olivia, and given the amount of parent training Father had received over the past year, it is possible that he is "not capable of acquiring and using" the information that has been provided. Dr. Johnson acknowledged that Father is motivated to learn the necessary parenting skills and consistently attends the parenting programs. Despite Father's motivation, Dr. Johnson submitted that she has "grave doubt[s] about [Father's] abilities to gain the vast amount of specialized skill and knowledge that he [needs] to address [Olivia's] multiple ongoing special needs."

¶17 Dr. Johnson also was concerned when Father revealed with little emotion that Olivia endured potentially harmful experiences while in Mother's care and that Father failed to mention any history of domestic violence with Mother. As a result of her observations, Dr. Johnson was unable to recommend further reunification services and urged that "serious consideration . . . be given to a permanency plan for Olivia that involves permanent placement with someone other than one of her parents."

¶18 After months of therapy between Father and Olivia, a therapist recommended the "immediate termination of visits." The therapist stated that Father was "unable to appropriately parent even with [her] direction" and that the "visits [caused] distress for Olivia." She indicated that she discussed the cessation of visits with Father and Olivia and that they both seemed "relieved at the change." Based on her recommendation, ADES terminated Father's visits.

¶19 Family Preservationists closed Father's case, concluding that the services provided to Father were of no benefit. Although Father had completed over a year of parent training and supervised visitation, he remained unable to appropriately communicate with Olivia, discipline her, set boundaries, make decisions in her best interests, or understand her special needs. The ADES caseworker testified Father did not successfully complete the program and that he merely went "through the motions" of participating in services.

¶20 Dr. Thal conducted another psychological evaluation, in part to see if there were any additional services ADES could provide Father to assist with reunification. Based on that evaluation, Dr. Thal determined that Father could not adequately parent Olivia, was unable to meet her special needs, was unlikely to be able to appropriately parent in the foreseeable future and that Olivia was at risk of emotional and physical abuse in Father's care,[4] and that Father's main motivation was focused on reuniting with Mother. Dr. Thal noted that although Father

[4] Dr. Thal specified that Olivia's risk of physical abuse would arise from Mother if Father reunited with Mother.

expressed attachment to Olivia, his actions were inconsistent with any goal to reunite with Olivia. Dr. Thal therefore concluded that severance of Father's parental rights and a future adoption was the most appropriate case plan.

¶21 Dr. Thal also testified there are no additional services available to remedy Father's parenting deficits. He testified that a "broad array of services" were provided to Father and that the types of providers offering those services "continue with treatment approaches and therapies and supervising activities beyond the point where a lot of other people . . . might throw in the towel."

¶22 Despite the recommendations to discontinue services, ADES arranged for Father to begin counseling. The counselor provided couples' therapy to Mother and Father and individual therapy to Father. After three months, the counselor recommended cessation of counseling based on Father's "pervasive personality deficits coupled with a lack of intrinsic motivation." She noted that Father appeared more interested in Mother than Olivia and that he had no insight into the dangers that Mother posed to Olivia. Father failed to keep several appointments. Based on that recommendation, ADES terminated services.

¶23 At the contested termination hearing, the ADES caseworker testified that all of the recommended services had been provided to Father and that she could not think of any additional services to provide. She also noted that Father never requested any additional services. With respect to Father's relationship with Mother, she testified that Father was fearful of Mother but that he has repeatedly reunited with her because he was afraid she would retaliate against him. He also told the caseworker that he wished to give Mother "the benefit of the doubt." Although

Father finalized his divorce from Mother he allowed her to return to his home. Father obtained a restraining order against Mother but, a few months later, once again allowed Mother to return. Even while Father allowed Mother to reside with him, Father acknowledged that she was "homicidal and suicidal," and that she posed a risk of harm to Olivia.

¶24 The juvenile court terminated Father's parental rights. The court found that ADES made diligent efforts to provide reunification services to Father, that Father partially complied with the services, that Olivia had been in an out-of-home placement for a period of fifteen months or longer pursuant to court order, that Father was unable to remedy the circumstances that caused Olivia's out-of-home placement, and that termination of Father's parental rights was in Olivia's best interests.[6] *See* A.R.S. § 8-533(B)(8).

¶25 Father filed a timely notice of appeal from the juvenile court's order terminating his parental rights. This Court has jurisdiction pursuant to A.R.S. §§ 8-235 (Supp. 2005) and 12-120.21 (2003).

DISCUSSION

¶26 The severance of a parent's right to custody and control of his children is a severe action impacting the parent's fundamental constitutional interests. *Steven K. V. Arizona Dep't of Econ. Sec.*, 210 Ariz, 483, 487, ¶ 12, 113 P.3d 1240, 1244 (App. 2005). "[T]his fundamental right

[6] The court also found that the evidence did not demonstrate Father suffered from any mental illness or deficiency.

does not evaporate simply because the natural parents have not been model parents or have lost temporary custody of their child to the state." *Id.* (quoting *Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 4, 804 P.2d 730, 733 (1990)). Accordingly, such action should only be taken as a last resort. *Id.*

¶27 In Arizona, "[t]ermination of parental rights is governed solely by A.R.S. § 8-533." *Michael J.*, 196 Ariz. 246, 248-49, ¶ 12, 995 P.2d 682, 684-85 (2000). To justify termination of the parent-child relationship, the trial court must find at least one of the statutory grounds set out in section 8-533, and also that, termination is in the best interests of the child. *See* A.R.S. § 8-533(B); *Michael J.*, 196 Ariz. at 248-49, ¶ 12, 995 P.2d at 684-85. Arizona's statutes require that the party seeking termination of parental rights establish the statutory grounds of section 8-533 by clear and convincing evidence and establish the best interests of the child by a preponderance of the evidence. *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 22, 110 P.3d 1013, 1018 (2005).

¶28 Because the juvenile court as the trier-of-fact is in the best position to weigh the evidence, we defer to the court's findings and do not reweigh the evidence. *Steven K.*, 210 Ariz. at 487, ¶ 13, 113 P.3d at 1244. We reverse a severance of parental rights based on the insufficiency of the evidence only if the order is clearly erroneous. *Id.* Under this standard of review, we will not disturb the juvenile court's decision if there is reasonable evidence to support the termination of parental rights. *Id.* However, we review de novo legal issues requiring the interpretation and application of § 8-533. *Id.*

¶29 We are presented with four issues on appeal. The first issue is whether the phrase "circumstances which cause" out-of-home placement in § 8-533(8)(b) is unconstitutionally vague. The remaining three issues are whether there is sufficient evidence supporting the juvenile court's findings that: (1) Father was unable to remedy the circumstances that caused Olivia's fifteen month out-of-home placement; (2) ADES made a diligent effort to provide appropriate reunification services to Father; and (3) termination of Father's parental rights was in Olivia's best interests. We address each of these issues below.

A. Father was Unable to Prove that the Phrase "Circumstances Which Cause" the Child to be in an Out-of-Home Placement in A.R.S. Section 8-533(8)(b) is Unconstitutionally Vague or Overbroad.

¶30 Father argues that the phrase "circumstances which cause" in A.R.S. § 8-533(8)(b) is unconstitutionally vague or overbroad. We first note that Father appears to have waived this issue by not raising it in the juvenile court. *See Data Sales Co., v. Diamond Z. Mrg.*, 205 Ariz. 594, 601, ¶ 31, 74 P.3d 268, 275 (App. 2003) (Guarantor of lease waived on appeal its argument regarding requested jury instructions in action by lessor to collect on defaulted lease, when guarantor failed to object to the jury instruction given by the trial court, and there was no fundamental error). In any event, we do not find merit to Father's argument.

¶31 There is a presumption in favor of the constitutionality of a statute. *Maricopa County Juv. Action No. JS-5209 and No. JS-4963*, 143 Ariz. 178, 183, 692 P.2d 1027, 1032 (App. 1984). A statute is unconstitutionally vague "if it fails to give a person of ordinary intelligence a reasonable

opportunity to know what is prohibited, so that he may act accordingly, or if it allows for arbitrary and discriminatory enforcement by failing to provide an objective standard for those who are charged with enforcing the law." *Id.* at 183, 692 P.2d at 1032 (internal quotation omitted). This vagueness test is applicable to parental rights termination cases as parents are entitled to notice of what type of conduct will cause them to lose the custody and control of their children. *Id.* The fact that a term is not defined does not render the statute unconstitutional. *Id.* A statute will not be held void for vagueness if any reasonable and practical construction can be given to its language and the required meaning may be derived from an established technical or common law meaning. *Id.* The clear and convincing evidence standard employed in parental termination cases protects the parent's right to avoid termination based upon imprecise standards. *Id.* at 185, 692 P.2d at 1034.

¶32 In *JS-5209* and *JS-4963*, this Court addressed the issue of whether the term "parental responsibilities" in A.R.S. § 8-533(B)(3) is unconstitutionally vague. *Id.* This Court held that statutory definitions and prior decisions gave sufficient meaning to the term "parental responsibilities" so as to meet constitutional standards, but also relied on the common understanding of the term "parental responsibilities" and the evidence presented as to the responsibilities that were not met. *See id.* at 185-86, 692 P.2d at 1034-35. Thus, persons of ordinary intelligence could understand the term "parental responsibilities" as meaning those duties or obligations that a parent has with regard to his child. *Id.* at 185, 692 P.2d at 1034. This Court also held that the evidence presented at the hearing supported the finding that the mother did not meet her parental responsibilities. *Id.* at 186, 692 P.2d at 1035.

Based on these factors, this Court concluded that the term "parental responsibilities" was not unconstitutionally vague. *Id.*

¶33 Here, the State is required to provide notice to parents of the specific reasons why it has removed a child from the parents' home as, well as the reasons and facts upon which dependency is claimed. A.R.S. §§ 8-823(B)(1)-(2), 7(a) and -841(B)(3) and (C)(1); Ariz. R.P. Juv. Ct. 48(C) and (D). These grounds provide sufficient information to a persons [sic] of ordinary intelligence to understand the circumstances which caused, out-of-home placement. The record in this case demonstrates the factors that caused Olivia's out-of-home placement were: after more than a year of participating in services, Father failed to show any improvement in his parenting skills or in his ability to understand Olivia's needs; Father's efforts to reunite with Olivia declined over time and he appeared more concerned with reuniting with Mother than with Olivia; he was unable to sever ties with Mother even though he acknowledged that she posed a danger to Olivia; and Father posed a physical and emotional threat to Olivia.

¶34 To the extent that Father implies that be was not notified of the circumstances he would have to remedy before he could regain custody of Olivia, the records and testimony of the ADES caseworker and parent aides reflect Father was advised at every stage of Olivia's development about what he needed to do to regain custody. Father's witness and exhibit list and opening and closing arguments also reflect he understood those circumstances.

¶35 Based on the evidence presented as to the cause of Olivia's out-of-home placement, and Father's knowledge of the steps needed in order to reunite with Olivia, we find

that Father has not proven that the phrase at issue is unconstitutionally vague.

B. Father was Unable to Remedy the Circumstances that Caused Olivia's Fifteen-Month Out-of-Home Placement.

¶36 Father claims that ADES failed to prove that he had been unable to remedy the circumstances that caused Olivia's out-of-home placement.[6] Father specifically claims that the lack of evidence of an ongoing addiction to alcohol or of current domestic violence between him and Mother, and evidence that he had obtained a divorce from Mother and a restraining order against her, indicated that he, had remedied the circumstances outlined in the dependency petition.

¶37 The record supports the juvenile court's finding that Father was unable to remedy those circumstances. One expert expressed doubts as to whether Father could appropriately learn to parent Olivia and that Father would continue to place her safety at risk when he left Olivia in Mother's care. Other experts opined Father did not understand how to effectively parent Olivia or set boundaries, that the visitations caused Olivia much distress, and that Father presented a risk for physical or emotional abuse.

¶38 Even after a year of reunification services. Father failed to learn the skills necessary to appropriately parent Olivia, how to communicate and interact with Olivia, set

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[6] Father does not contest that Olivia was in an out-of-home placement for longer than fifteen months.

boundaries, discipline, or handle her special needs. Indeed, Father appeared to be merely going through the motions of completing the programs. Father's initial motivation for reunification also declined as he started to miss appointments and appeared more concerned with reuniting with Mother than with Olivia. Olivia remained at risk for physical, emotional and possibly sexual abuse if she resided with Father.[7] The visitations increasingly caused Olivia distress and Olivia and Father seemed relieved when they were told the visitations would end.

¶39 Finally, several experts and the ADES caseworker expressed concern over Father's relationship with Mother. They all suggested that because Father chose to continually reunite with Mother, Father placed Olivia in harm's way.

¶40 The record clearly supports the court's finding that Father was unable to remedy the circumstances that caused Olivia to remain in an out-of-home placement.

C. ADES Made a Diligent Effort to Provide Reunification Services.

¶41 The juvenile court determined that ADES made reasonable efforts to achieve reunification between Father and Olivia. On appeal, Father claims that ADES failed to provide appropriate reunification services. Specifically, Father claims that ADES failed to provide services to address Olivia's special needs and that the limited visitation schedule and later termination of his

[7] While one expert testified Father did not pose a sexual risk to Olivia, Olivia's counselor opined that Father may have been "grooming' Olivia for a sexual assault.

visits constituted a lack of diligent reunification efforts. We disagree.

¶42 ADES must show that it made a "diligent effort" to provide appropriate reunification services before it may seek to terminate parental rights. A.R.S. § 8-533(B)(8). ADES fulfills its statutory mandate when it provides the parent with "the time and opportunity to participate in programs designed to help [him] become an effective parent." *Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 353, 884 P.2d 234, 239 (App. 1994). However, ADES is not required to provide the parent with every conceivable service or to ensure that the parent participates in every service that it offers. *Id.* Nor is ADES obligated to provide services which are futile. *Matter of Pima County Severance Action No. S-2397*, 161 Ariz. 574, 577, 780 P.2d 407, 410 (App. 1989).

¶43 At the contested hearing, the ADES caseworker testified that after more than a year of reunification services, all of the recommended services had been provided to Father and that there were no additional services to offer. Father also had not requested any additional services. The record clearly supports the juvenile's court findings that ADES made a diligent effort to provide reunification services to Father.

D. Termination of Father's Parental Rights was in Olivia's Best Interests.

¶44 Father also challenges the juvenile court's finding that termination of his parental rights was in Olivia's best interests and that termination would allow Olivia to be adopted, which would provide her with "emotional stability and consistent care." Specifically, Father argues there

was no evidence regarding the reason Olivia was removed from her previous adoptive placement or how her current adoptive placement was meeting her needs and that there was evidence that Olivia was bonded to Father.

¶45 To support a finding that termination is in the child's best interests, the petitioner must prove that the child will affirmatively benefit from the termination. *Mary Lou C. v. Arizona Dep't of Econ. Sec.*, 207 Ariz. 43, 50, ¶ 19, 83, P.3d 43, 50 (App. 2004). The juvenile court may consider that a current adoptive plan exists for the child, that the child will be freed from an abusive parent, or that the child is adoptable. *Id.* The juvenile court may also consider evidence that an existing placement is meeting the needs of the child. *Id.*

¶46 The evidence here demonstrates that Olivia is a special needs child who is easily frustrated, difficult to redirect, developmentally delayed and needs to be placed with a family who has the skills to understand and meet her special needs. The evidence also showed Olivia is an adoptable child and the prospective adoptive family Olivia has been residing with is aware of Olivia's special needs and is able and willing to meet them.

¶47 In contrast, the expert witnesses reported Father was unable to provide the level of parenting Olivia needed and doubted whether Father would be able to gain the skill necessary to address Olivia's special needs. Moreover, the witnesses testified that placing Olivia in Father's care would put her at risk of emotional, physical and sexual abuse.

¶48 Based on these facts, we conclude that the court did not err in holding that severance of Father's rights was in Olivia's best interests.

CONCLUSION

¶49 For the foregoing reasons, we affirm the juvenile court's decision to sever Father's parental rights.

/s/ [Illegible]
DONN KESSLER,
Presiding Judge

CONCURRING:

/s/ [Illegible]
JEFFERSON L. LANKFORD,
Judge

/s/ James B. Sult
JAMES B. SULT, Judge

AG Julie Rhodes
DES Julie Kaplan (148C)
LA Leslie Hatfield
CASA Leah Ruggieri
FCRB

FILED: 11-22-04

SUPERIOR COURT OF ARIZONA
Maricopa County
Juvenile Division

HONORABLE WILLIAM P. SARGEANT III

11-22-04
Date

T. Dunn
Deputy Clerk

No. JD 12403

IN THE MATTER OF

OLIVIA DMYTERKO

JOSEPH W. CHARLES

The Court heard testimony and argument in this Severance action and took the issues under advisement in order to review the Exhibits. The Court has completed that review, has reviewed trial notes and based upon evidence that is clear and convincing,

FINDS AND CONCLUDES that:

1. The Court has jurisdiction as the child, Olivia Dmyterko, resided in Maricopa County, Arizona at the time the Motion for Termination was filed.

2. The child is not an Indian or Native American child and the provisions of the Indian Child Welfare Act do not apply.

3. The father, Alex Dmyterko, was present with his counsel, Joseph W. Charles, throughout the proceedings.

4. Parental rights of the mother, Anne Dmyterko, were terminated on 10-13-04 and are not at issue in this proceeding.

5. The Arizona Department of Economic Security has made diligent efforts to provide reunification services to the father. Alex Dmyterko has partially complied with offered services.

6. The allegations of mental illness or mental deficiency on the part of the father was not established by clear and convincing evidence.

7. The child has been in out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order and the father has substantially neglected or willfully refused to remedy the circumstances which cause the child to be in an out-of-home placement.

8. The best interests of the child would be served by termination of the parent-child relationship. Termination would allow the child to be adopted which would provide the child with emotional stability and consistent care.

IT IS THEREFORE ORDERED terminating the parent-child relationship between Alex Dmyterko and the child, Olivia Dmyterko, committing her to the care, custody and control of the Arizona Department of Economic Security.

The father is advised of his right to appeal from this order to the Arizona Court of Appeals. A Notice of Appeal must be filed with the Clerk of the Superior Court no later than fifteen (15) days after this order is filed with the Clerk.

The rules governing appeal are set forth in the Rules of Procedure of the Juvenile Court.

11-22-04 /S/
Date HONORABLE WILLIAM P. SARGEANT III

[LOGO]

Supreme Court

STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 542-9396

NOEL K. DESSAINT
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

April 20, 2006

RE: ALEX D. v ADES/OLIVIA D.
Arizona Supreme Court No. CV-05-0402-PR
Court of Appeals Division One No. 1 CA-JV 04-0232
Maricopa County Superior Court No. JD 12403

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 20, 2006, in regard to the above referenced cause:

ORDERED: Appellant's Petition for Supreme Court Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 20th day of April, 2006.

Noel K Dessaint, Clerk

TO:
Joseph W Charles, Joseph W Charles PC
Hon Terry Goddard, Arizona Attorney General
Attn: Dawn Rachelle Williams

West Publishing Company
Lexis-Nexis
Philip G Urry, Clerk, Court of Appeals, Division One, Phoenix
sdt

A.R.S. § 8-533 (2006). Petition; who may file; grounds

A. Any person or agency that has a legitimate interest in the welfare of a child, including, but not limited to, a relative, a foster parent, a physician, the department of economic security or a private licensed child welfare agency, may file a petition for the termination of the parent-child relationship alleging grounds contained in subsection B of this section.

B. Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court shall also consider the best interests of the child:

1. That the parent has abandoned the child.

2. That the parent has neglected or wilfully abused a child. This abuse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child.

3. That the parent is unable to discharge the parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.

4. That the parent is deprived of civil liberties due to the conviction of a felony if the felony of which that parent was convicted is of such nature as to prove the unfitness of that parent to have future custody and control of the child, including murder of another child of the parent, manslaughter of another child of the parent or aiding or abetting or attempting, conspiring or soliciting to

commit murder or manslaughter of another child of the parent, or if the sentence of that parent is of such length that the child will be deprived of a normal home for a period of years.

5. That the potential father failed to file a paternity action within thirty days of completion of service of notice prescribed in section 8-106, subsection G.

6. That the putative father failed to file a notice of claim of paternity as prescribed in section 8-106.01.

7. That the parents have relinquished their rights to a child to an agency or have consented to the adoption.

8. That the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency, that the agency responsible for the care of the child has made a diligent effort to provide appropriate reunification services and that either of the following circumstances exists:

(a) The child has been in an out-of-home placement for a cumulative total period of nine months or longer pursuant to court order or voluntary placement pursuant to section 8-806 and the parent has substantially neglected or wilfully refused to remedy the circumstances which cause the child to be in an out-of-home placement.

(b) The child has been in an out-of-home placement for a cumulative total period of fifteen months or longer pursuant to court order or voluntary placement pursuant to section 8-806, the parent has been unable to remedy the circumstances which cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising

proper and effective parental care and control in the near future.

9. That the identity of the parent is unknown and continues to be unknown following three months of diligent efforts to identify and locate the parent.

10. That the parent has had parental rights to another child terminated within the preceding two years for the same cause and is currently unable to discharge parental responsibilities due to the same cause.

11. That all of the following are true:

(a) The child was cared for in an out-of-home placement pursuant to court order.

(b) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services.

(c) The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed.

(d) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

C. In considering the grounds for termination prescribed in subsection B, paragraph 8 or 11 of this section, the court shall consider the availability of reunification

services to the parent and the participation of the parent in these services.

D. In considering the grounds for termination prescribed in subsection B, paragraph 8 of this section, the court shall not consider the first sixty days of the initial out-of-home placement pursuant to section 8-806 in the cumulative total period.